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In The

Supreme Court of the United States

October Term, 1994

WVCH, COMMUNICATIONS INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP and SUE TIEFENTHALER,

Respondents,

-and-

WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

DON BAILEY
Counsel of Record
Attorney for Petitioners
845 Sir Thomas Court
Suite 9
Harrisburg, Pennsylvania 17109
(717) 541-4400

5481
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Can a citizen's rights to substantive due process under the Fourteenth Amendment be violated by years of intentional, biased, and politically motivated delay in a local hearing process irrespective of when, or if, the state should grant the property right sought, particularly when the delay is deliberately and knowingly based on matters having virtually no relationship to the purpose or jurisdiction of the hearing body?

2. Is the preemptive power of the Federal Communications Commission to locate and license AM/FM radio stations subject to control by local zoning schemes?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Statement of Jurisdiction 3

Constitutional Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 9

I. A citizen's right to substantive due process of law under the Fourteenth Amendment is violated by years of intentional, biased, and politically motivated delay in a local hearing process irrespective of when, or if, the state should grant the property right sought, particularly where the delay is deliberately and knowingly based on matters having virtually no relationship to the purpose of jurisdiction of the hearing body. 9

II. The preemption powers of the federal communications commission to place and license AM/FM radio stations is not subject to control by local zoning schemes. 15

Conclusion 17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bello v. Walker, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 (1988) . . . 9, 14, 17

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 10

Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) 12, 13, 14, 17

Fidelity Federal Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982) 15

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) 15

Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399 (1941) 16

Midnight-Sessions, Ltd. v. Hock City of Philadelphia, 945 F.2d 667 (3d Cir. 1991) 10

Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) 11, 12

Taylor v. Upper Darby Township, 983 F.2d 1285 (3d Cir. 1993) 14

Contents

Page

Taylor Invest Ltd. v. Upper Darby Township, 983 F.2d 1985 (3d Cir. 1993) 8, 17

Wolfe v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 14

Statute Cited:

42 U.S.C.A. § 1983 .....2, 7, 12

United States Constitution Cited:

First Amendment 2, 3, 4, 8, 16

Tenth Amendment 2

Fourteenth Amendment .....i, 2, 3, 7, 9, 11, 12, 14, 17

Rules Cited:

Supreme Court Rule 10.1(c) 3

Fed. R. Civ. P. 12 (b)(6) 2

APPENDIX

Appendix A — Order Denying Rehearing of the United States Court of Appeals Filed June 1, 1994 ..... 1a

Appendix B — Decision of the United States Court of Appeals Filed May 4, 1994 ..... 3a

Contents

Page

Appendix C — United States District Court Memorandum and Order Filed July 15, 1993 ..... 5a

Appendix D — United States District Court Memorandum and Order Filed December 23, 1992 ..... 16a

No.

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PETITION FOR WRIT OF CERTIORARI

The petitioner WVCH Inc. a licensed radio station, and Thomas H. and Alice E. Moffit the owners thereof, by and through their Attorney Don Bailey, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit entered on May 4, 1994 denying petitioners' claim that the politically and personally motivated intentional delay, for years, in the evaluation of an application to a zoning hearing board for a permit, on knowingly unrelated grounds, constituted a violation of petitioners' Fourteenth Amendment substantive due process rights to be free from an intentional abuse of government power in the absence of a reasonable government purpose. The review should also include the issues of the petitioners' and the public's First Amendment Rights in the preemptive power of the Federal Communications Commission, and the purposes of the Federal Communications Act, under the Commence Clause as contrasted with the powers of a local zoning hearing board to pre-empt, in the name of individual property rights under the Tenth Amendment, the broader individual and national interest in radio and television broadcasting.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit upholding the District Court was filed on May 4, 1994. A motion for reconsideration was denied on June 1, 1994. The Order denied the Petitioners' claim for relief under 42 U.S.C. § 1983. Earlier orders of the United States District Court for the Eastern District of Pennsylvania denied petitioners' request for declaratory and injunctive relief also under 42 U.S.C. § 1983. The District Court Memorandum and Order entered on December 23, 1992 upholding petitioners' claim and dismissing certain respondent's Fed. R. Civ. P 12 (b)(6) motions is attached hereto and marked Appendix D. The District Court Memorandum and Order vacating the December 23, 1992 decision and dismissing both petitioners'

first and second complaint which was entered on July 15, 1993 is attached hereto and marked Appendix C. The Third Circuit order upholding the District Court is attached hereto and marked Appendix B. The Third Circuit Order denying rehearing is attached hereto and marked Appendix A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 4, 1994 (App. B). The order of the United States Court of Appeals for the Third Circuit denying petitioners' request for a rehearing was entered on June 1, 1994 (App. A). The jurisdiction of this Court is based on Rule 10.1 (c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment to the United States Constitution:

> Congress shall make no law respecting or establishing religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I, Section 8 of the Constitution of the United States:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

Petitioners are an AM/FM radio station and its owners who provide religious broadcasting services and public services over the airwaves. In early 1989 the petitioners located a piece of ground zoned Agricultural/Residential in Upper Providence Township Montgomery County, Pennsylvania. It was necessary to move WVCH from Chester County Pennsylvania to allow broadcasting at a much higher power in order to add millions to the station's listening area. The move was necessitated by the demands for WVCH programming in the Philadelphia/Camden/ Wilmington areas and it was required by the FCC in order to allow for a needed increase in signal strength. When Tom Moffit first applied for a building permit in Upper Providence Township he was told by Township officials that it would be no problem. An engineering study on the real estate had revealed it to be an ideal location to meet FCC site approval requirements, not just geologically, but because it created no interference with other stations. Radio broadcasting is preemptively controlled by the FCC. The location of radio broadcasting stations, particularly "AM" stations is extremely limited geographically. This is because they take up considerable acreage and also because of the need to avoid interference from overlapping broadcasting patterns with other stations. When these natural limitations are overlaid on typical zoning maps there is often no place where "AM" radio stations can even be located. But Upper Providence Township seemed an ideal location. There were no apparent zoning restrictions because radio stations were not included in the local zoning scheme but were allowed by the county. The erection of the

broadcast towers were entirely consistent with permitted agricultural uses taking little actual space themselves. There were no height restrictions. A house to be used as a studio already existed on the property which was an old farm. Local counsel had advised WVCH to go forward. A political nightmare soon developed however. The land Moffit had purchased for WVCH, at approximately one-half its market value because of the prior landowner's sympathetic religious views, was highly prized for development purposes. The president of respondent Rhone-Poulenc Rorer, a French-owned drug company, wanted the WVCH land for his personal use. He offered the Moffits' what WVCH had paid for the land knowing it was an unusually low price. The Moffits' refused. They were then threatened by Rorer's lawyers, who promised Moffit that WVCH would never be built after the conclusion of a frivolous meeting. With their sister drug company Sterling, Rorer then orchestrated a carefully executed political and pseudo-legal plan to sap the petitioners of their personal resources through a preconceived conspiracy to intentionally delay the Zoning Hearing Board process. The delay consisted of 3 years of deliberately drawn out hearings conducted in a circus atmosphere. More than 80% of this hearing time was spent on a *de novo* evaluation of WVCH's FCC application and on radio frequency interference (RFI). RFI is totally preempted by the FCC. Even after formal evidence of that fact was promptly brought to the Zoning Hearing Board's attention the Board dismissed FCC preemption out of hand declaring simply that the Board "didn't care". One Board member, a Mr. McLaughin, quit in disgust. He declared that the WVCH hearings should have taken no more than half a dozen meetings and that the drug companies were involved in irregularities with the Board. Albeit he did not allege any personal bribes or misconduct by Board members. However the chairman of the Board, Clay Hess, is treasurer of one of the major political parties in Montgomery County. He had indicated 2 years earlier to a witness that he was going to favor the drug companies' wishes on the WVCH matter. His brother was employed by Rorer's counsel.

During the hearing process, fraudulently qualified experts, among others, were used by the drug companies to advance groundless fantasies about AM radio. These included claims of how AM radio could make bed-springs and kitchen appliances play music, cause cancer, and even shock children who touched metal objects up to miles away. The drug companies' other contention was that WVCH would interfere with laboratory equipment. That was simply impossible, at least if the drug companies were following federal law in their building practices, which, incidentally, they claim they were. Meanwhile, the only other Zoning Hearing Board Member, the respondent Walter Kalil, was doing tens of thousands of dollars worth of printing business with respondent Spring Ford School Board who was brought in and made a part of the anti-WVCH effort in front of the hearing board upon which Kalil sat as a member. Then a local citizens' group was formed. Its activities were in part unlawfully funded and promoted by the Zoning Hearing Board itself. The personal and financial relationships between and among the law firms, complainants before the Board, Township Supervisors who appoint the Board, and particularly Board members themselves, constituted numerous ethical and legal conflicts. None were disclosed to WVCH or the Moffits before or during the hearing process.

Procedurally this case began as a request by WVCH to Upper Providence Township for permission to begin building their radio broadcasting facility. The resultant refusal by the township led to hearings which were intentionally dragged along for more than three years. The vast majority of these hearings did not relate in any way to any real or potential interests the Moffits' or WVCH may have had in the building permit requested. The only legal issue, if at all, was whether the township zoning ordinance was exclusionary. And when the Zoning Hearing Board finally rendered a decision denying WVCH's request for a building permit, it never even mentioned the issue of radio frequency interference that it had spent 2 1/2 years on. This was done intentionally to avoid the

pitfalls of an appeal on that issue in state court. Thus petitioners could not respond under state law to this pre-planned intentional abuse. State law prevented any possibility of appealing the Boards' abuse on the frivolous part of the hearings over RFI, while preserving of course, the simple exclusionary issue that could be appealed at petitioners' choice to Common Pleas court. State sovereign immunity statutes prevent the possibility of recovery against the Board or its members for damages and furthermore require termination of proceedings in favor of a plaintiff in order to make out a cause of action to begin with. So while WVCH was finally able to appeal the denial of the permit itself under Pennsylvania law to the Court of Common pleas, the only recourse for the injuries suffered by petitioners was through 42 U.S.C. § 1983 because the grounds for appeal by virtue of the zoning hearing boards' action in not mentioning the frivolous hearings in their decision excluded consideration of their pretended jurisdiction over RFI.

Petitioners filed their first Civil Rights Complaint on October 5, 1992 in the United States District Court for the Eastern District of Pennsylvania. They requested injunctive and declaratory relief in addition to a request for money damages. Because an avenue of appeal existed in state court as to interpretations of the structure and application of the ordinance in question, the District Court denied the possibility of injunctive and declaratory relief but agreed to accept jurisdiction of the case for consideration of the damages claim. On December 23, 1992, in a detailed memorandum opinion, the District Court upheld petitioners' contention that they had made out a cause of action for the deprivation of their substantive due process rights under the Fourteenth Amendment. Shortly thereafter, through discovery and further investigation, petitioners discovered more evidence of egregious misconduct by the defendants below. On April 27, 1993 petitioners filed a second complaint against the individual Zoning Hearing Board members and the local School Board who, petitioners claimed, had become

involved in the wrongdoing for financial and political reasons. On July 15, 1993 the District Court issued a memorandum and order dismissing both complaints, *i.e.*, dismissing the second complaint out of hand, and reversing itself and dismissing the second complaint based upon an interpretation of a then recent Third Circuit case *Taylor Invest. Ltd. v. Upper Darby Township*, 983 F.2d 1985 (3d Cir. 1993). Petitioners appealed to the Third Circuit and oral argument was granted for March 7, 1994 after all parties submitted their briefs. The oral argument went well over the allotted time. Petitioners asked the Third Circuit to review the issue of whether an intentional, deliberate delay for other than reasonable government objectives accompanying a denial on grounds unrelated to the intentional delay, could ever constitute a substantive due process violation of a citizen's Fourteenth Amendment Rights. Petitioners also asked the Third Circuit whether local zoning schemes can negate and vacate the federally preempt powers of the FCC to determine where radio stations can be located, particularly where placing the station is *prima facie* consistent with the allowed land use in question. Petitioners also asked whether millions of citizens and their opportunity to enjoy a federally preempted, heavily regulated and extremely scarce recourse depended upon by the entire nation for information, must be denied those opportunities to participate and listen because a general zoning scheme pretends to preclude the possibility of building a non-obtrusive broadcasting facility in a particular municipality, or should the rights of all citizens to enjoy the limited broadcast spectrum of AM/FM radio through the constitutional prerogatives of the First Amendment and the Commerce Clause prevail over individual property interests ostensibly protected by a local zoning board, *i.e.*, should the broader interests of petitioners, and indeed all citizens, in the limited availability of the radio broadcast spectrum, regulated by the federal government pursuant to the Commerce Clause in furtherance of the First Amendment interests of all those same citizens, be subject to control by one municipality in the name of local property rights. Petitioners

concluded oral argument with a request to the Third Circuit to define the nature of the interests violated reviewing the damage here as akin to abuse of process, a liberty interest protected by the due process clause of the Fourteenth Amendment. The court then concluded argument with a request for limited additional briefing. On May 4, 1994 the Third Circuit issued a one sentence opinion affirming the lower court's decision. Petitioners appealed to the court en banc for reconsideration but were denied on June 1, 1994.

REASONS FOR GRANTING THE WRIT

I.

A CITIZEN'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT IS VIOLATED BY YEARS OF INTENTIONAL, BIASED, AND POLITICALLY MOTIVATED DELAY IN A LOCAL HEARING PROCESS IRRESPECTIVE OF WHEN, OR IF, THE STATE SHOULD GRANT THE PROPERTY RIGHT SOUGHT, PARTICULARLY WHERE THE DELAY IS DELIBERATELY AND KNOWINGLY BASED ON MATTERS HAVING VIRTUALLY NO RELATIONSHIP TO THE PURPOSE OR JURISDICTION OF THE HEARING BODY.

According to the Third Circuit's own decisions the alleged misconduct in this case would be a clear example of the "deliberate and arbitrary abuse of government power." *Bello v. Walker,* 840 F.2d 1124 (3d Cir), *cert. denied*, 488 U.S. 851, 868, 109 S. Ct. 134, 176, 102 L. Ed. 2d 107, 145 (1988). (App. 22a, 23a). However, the Third Circuit, by upholding the District Court in the case at bar, requires a citizen to prevail on the merits of a building permit application, and thus prove their entitlement to a property interest, before that citizen can prevail on any substantive due process claim

no matter how irrelevant, outrageous, or injurious, the state's abuse of the hearing process itself might be. (App. 10a). If the citizen can't eventually prevail on the merits of their land use application, they can claim no injury for deprivations of other rights. This scenario creates a constitutional Catch-22 for the citizen. It even gives a state the right to decide, in a context of intentional abuse such as the frivolous delay we see here, whether it will bestow the property right that would make the abuse actionable — but only if the state grants the permit. Here the Third Circuit is vicariously interpreting *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) in a wrongfully limited sense, *i.e.*, that *only* property rights are at issue under the facts outlined here while ignoring a citizen's interest in a fair hearing itself. "A property interest subject to protection by the due process clause results from a 'legitimate claim of entitlement' created by an independent source such as state law." *Midnight-Sessions, Ltd. v. Hock City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991) interpreting this Court's decision in *Brown* above. The Third Circuit simply stops short. Their view improperly identities only state created property rights, as opposed to a proper appreciation of a citizen's liberty interests akin to an abuse of process, in situations where the hearing process itself is intentionally misused. If a citizen has no choice but to go before a zoning hearing board to gain approval for using his property in certain ways, then he is being subjected to the states exercise of its police powers. These powers are exercised not just over his potential property interests, but over his person as well during the hearing process itself. If he must subject himself to the requirements of the states procedure in his quest for a state granted property right, he is entitled to a fair and reasonable hearing process in and of itself. Thus, if the state, in exercising its control over that citizen's quest for a property interest, makes a citizen stand before it for irrelevant, ulterior reasons designed to harass and intimidate the citizen for a period of years, then the citizen has been deprived of a due process liberty interest which is unrelated to, and not dependant upon, whether he ever prevails in his quest

for permission to use his property subject to the state's consideration.

Thus, according to the holding below, if the state correctly denies a property interest, there can be no recovery for abuse of the hearing process itself no matter how cruel or unrelated that abuse may be to the property issue itself. Such a proposition renders substantive due process under the Fourteenth Amendment virtually meaningless, unless and until, a citizen can prevail on a hoped for claim to a state created property interest. This view sees only property interests at stake in a zoning hearing process and ignores a citizen's right not to have the hearing process itself used as an instrument of extreme abuse for unrelated purposes. Strangely the Third Circuit seems to be thinking in terms of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), which assumes that a state hearing process itself is at least relevant to the subject before it. *Parratt* focuses on whether a state provides a meaningful post deprivation remedy, *i.e.*, a meaningful process for evaluating the merits of a property claim. *Parratt* does not address matters such as a person's liberty interest to be free from being forced to go through an irrelevant, elongated hearing process designed to harass and intimidate him. *Parratt* is not a substantive due process case decided in the context of a intentional abuse of government power. The Supreme Court recognized that fact when it wrote *Parratt*. In fact the syllabus to the Lawyers Edition citation of the case (68 L. Ed. 2d 420) at page 424 states "there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers, the state action not necessarily being complete in the latter situation." But the question here relates to neither. Because there are separate and different rights violated by abusing and misusing the hearing process itself which has nothing to do with whether procedural due process is adequate or whether there is an entitlement to the property right in question under state law. Those separate rights are our substantive

due process rights to be free of abusive and intentional government actions unrelated to any reasonable government end. They are akin to an abuse of process or misuse of process that rises to a substantive level when the misconduct is so egregious. If this were not so, we wouldn't need a Fourteenth Amendment — it would serve no end at all. According to the Third Circuit, unless the state grants us an enforceable right, we have no claims for the way we're mistreated during a hearing process. All the state has to do to avoid a 42 U.S.C.A. § 1983 action is make sure the mistreatment doesn't relate to a state created property interest. That is precisely what was done for precisely the above reason in this case. *Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) clearly governs this case, but the Third Circuit failed to interpret and apply it, even though the due process issue therein was clearly before them. Mr. Justice Rehnquist, writing for a unanimous Supreme Court in *Daniels,* took great pains to describe the history and parameters of substantive due process rights under the Fourteenth Amendment. Merely because *Daniels* was factually about negligent conduct of state officials and certain interpretations of *Parratt,* does not mean that the carefully analyzed and articulated guidance of the Supreme Court of the United States should be ignored. At page 331 of the *Daniels* decision the Supreme Court discussed what the meaning of the due process clause is today and what it has meant historically.

> The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. E.g., Davidson v. New Orleans, 96 U.S. 97 (1878) (assessment of real estate); Rochin v. California, 342 U.S. 165 (1952) (stomach

pumping); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Ingraham v. Wright, 430 U.S. 651 (1977) (paddling student); Hudson v. Palmer, 468 U.S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before Parratt supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbearer in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of government," Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819)). See also Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889)"); Parratt, supra, at 549 (Powell, J. concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being "used for

> purposes of oppression," Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

If the Fourteenth Amendment does not prohibit the abuse alleged under the facts in this case then any state or local government is free to concoct any subterfuge they please to harass and intimidate a citizen who must come before them to seek a state created property right. The "touchstone of due process is the protection of the individual against the arbitrary actions of the government". *Wolfe v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935. The Third Circuit not only misapplied its own case law but failed to properly apply standards laid down by the Supreme Court of the United States. In so doing it interpreted the facts in *Bello* above, where the injured parties apparently did gain their permit rights, to mean that the state must grant a property right, pursuant to its own law, before a citizen abused through unjust delay can litigate the violation of other separate rights protected and guaranteed under the Fourteenth Amendment. The Court also misapplied *Taylor v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993) which is also its own case. *Taylor* is clearly a ripeness case and in fact supports petitioners' contention that petitioners could do nothing under Pennsylvania law while before the Upper Providence Township Zoning Hearing Board, *i.e.*, they could only seek relief once the Board made its final decision. This they did.

II.

THE PREEMPTION POWERS OF THE FEDERAL COMMUNICATIONS COMMISSION TO PLACE AND LICENSE AM/FM RADIO STATIONS IS NOT SUBJECT TO CONTROL BY LOCAL ZONING SCHEMES.

Also before the Third Circuit was a question of federal preemption pursuant to the Commerce Clause in conflict with local zoning powers. This was a question of first impression for the Third Circuit under the facts in this case, to the best of petitioners' knowledge. Federal law has evolved two types of implied federal preemption where our courts have not been able to discern an express statutory provision granting it. Petitioners do not argue that the FCC has expressly pre-empted local ordinances as to the location of AM/FM radio stations. However it is physically impossible to locate directional AM radio broadcast systems without at least tens of acres to accommodate the buried ground arrays that radiate from the 4 to 6 towers needed. These systems are not ungainly or ugly, create no hazards of any type, and are quite compatible with any zoning use, but particularly with agricultural uses where they create good pasture and ground crop conditions. But the sites where these systems can be located, because of signal interference with other stations, and because of geological considerations, is extremely limited to a small number of locations. Certainly field preemption, which is where the federal regulatory involvement is "so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta,* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982), is not in doubt here. The other type of implied preemption occurs where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc., v. Paul,* 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) and/or where state law "stands as an obstacle to the accomplishment and execution of the

full purposes and objections of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). Clearly these standards are met under the facts of this case. If the FCC cannot be free to locate radio stations in response to shifting demographics and the dictates of geology then radio and television broadcasting as we know it might as well cease to exist or at least we must face its greatly reduced availability. This is especially true when a broadcast facility which is far less obtrusive than a pig, chicken, or cattle farm which is allowed in an area zoned agriculture as here. The reluctance of our courts to address zoning issues is an understandable facet of modern life in the United States. But surely there is a First Amendment interest not just for broadcasters, but for all citizens in free and unhampered access to the broadcast spectrum regulated in the common interest under the Commerce Clause. Though the FCC has never asserted their preemptive authority to ignore local zoning powers in the limited area of locating stations, that authority undoubtedly exists. The FCC's failure to fulfill their general Congressional mandate should not allow millions of people to be denied access to, and utilization of, the airwaves. Nature and demographics dictate the optimum location of radio stations. Irrational local actions in the name of property rights or the accidents of a comprehensive zoning plan should not be allowed to prevent the optimum use of the airwaves. This Court should make clear in First Amendment and Commerce Clause terms, that the FCC has a preemptive power and right on behalf of broadcasters' interests but more importantly the general publics' interest, to seek and encourage the most complete use of the broadcast spectrum. To do so the FCC should exclusively site AM radio stations without having to fear interference from local zoning boards.

CONCLUSION

The opinion of the Court of Appeals for the Third Circuit is in violation of the Due Process Clause of the Fourteenth Amendment and is contrary to, *inter alia,* its own decisions in *Bello v. Walker* and *Taylor Invest Ltd. Inc., v. Upper Darby Township* and is also contrary to this Court's holding in *Daniels v. Williams,* and the opinion of the Court of Appeals of the Third Circuit also fails to recognize the need for FCC preemption of local zoning laws in the location of AM radio stations. Petitioners therefore request that this Honorable Court issue a writ of certiorari.

Respectfully submitted,

DON BAILEY
Counsel of Record
Attorney for Petitioners

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FILED JUNE 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1711 and 93-1712

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1711

vs.

UPPER PROVIDENCE TOWNSHIP, et al.,

WVCH COMMUNICATIONS, INC.; THOMAS E. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1712

vs.

WALTER KALIL, et al.,

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH and LEWIS, *Circuit Judges.*

Appendix A

The petition for rehearing filed by the appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ J. LEWIS
Circuit Judge

Dated: Jun 1 1994

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FILED MAY 4, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1711 and 93-1712

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1711

vs.

UPPER PROVIDENCE TOWNSHIP; UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD; RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING GROUP, AND SUE TIEFENTHALER

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1712

vs.

WALTER KALIL; CLAY HESS, INDIVIDUALLY; KALIL PRINTING, INC.; THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Appendix B

(D.C. Civil Nos. 92-05755 and 93-02225)
District Judge:Honorable Ronald L. Buckwalter

ARGUED MARCH 7, 1994

BEFORE: MANSMANN, LEWIS and SEITZ, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on July 16, 1993, be and is hereby AFFIRMED.

Costs taxed against the appellants.

BY THE COURT:
s/ J. Lewis
Circuit Judge

Attest:

s/ P. Douglas Sisk
Clerk
Date. MAY 4 1994

APPENDIX C — UNITED STATES DISTRICT COURT MEMORANDUM AND ORDER FILED JULY 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 93-CV-2225

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

WALTER KALIL, CLAY HESS, INDIVIDUALLY; KALIL PRINTING INC., AND THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL DISTRICT,

Defendants.

MEMORANDUM

BUCKWALTER, J. July 15, 1993

I. Introduction

In two separate motions, all defendants have moved to dismiss this complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, the motion is GRANTED.

Appendix C

II. Facts

The background facts of this case have previously been reported in a memorandum and order granting in part and denying in part defendants' motion to dismiss in a related case, *WVCH Communications, Inc., et. al, v. Upper Providence Township, et. al,* Civil Action No. 92-CV-5755, dated December 23, 1992. ("The December 23 Memorandum")[1] Plaintiffs Thomas H. and Alice E.

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1. The facts from the December 23 memorandum read as follows:

Plaintiffs Thomas H. and Alice E. Moffit (hereinafter collectively "Moffit") own WVCH, a for-profit, religion-oriented, AM radio station. WVCH is also a named plaintiff. The Moffits purchased a parcel of land in Upper Providence Township (the "Township") in order to expand and relocate WVCH. This parcel is zoned Residential/Agricultural, and thus Moffit could not put WVCH on that parcel without some change in the zoning. Accordingly, Moffit filed an application with the Upper Providence Township Zoning Hearing Board (the "Zoning Board") challenging the Upper Providence Zoning Ordinance (the "zoning ordinance") on the basis that it unconstitutionally excluded radio broadcast facilities from the Township. Various parties opposed this application, including defendants Rhone-Poulenc Rorer ("Rorer"). Sterling Research Group ("Sterling") and Susan Tiefenthaler, the leader of CART (Citizens Against Radio Towers) and also allegedly a Republican Committeewoman. Rorer and Sterling are both pharmaceutical companies.

In accordance with the application, a formal series of hearings began before the Zoning Board on September 19, 1989. Plaintiffs allege that the Zoning Board never intended to give them a fair hearing, and that the hearings were dragged out merely to harass and discourage them. No decision was handed down until October 2, 1992, the same day plaintiffs filed their complaint.

One of the issues in these hearings was radio frequency interference ("RFI"). Moffit alleges that the Zoning Board knew that consideration of RFI was preempted by federal law. This was a method by which opposition to the application, allegedly with the acquiescence of the Zoning Board, attempted to "extend the hearings an harass plaintiffs into submission."

(Cont'd)

Moffit (hereinafter collectively "Moffit") subsequently brought this action against Walter Kalil and Clay Hess, members of the Zoning Hearing Board, Kalil Printing, which is owned by Walter Kalil, and the School Board of the Spring-Ford School District ("School Board") as defendants.

In this action, plaintiffs allege that defendants Kalil and Kalil Printing desired to do business with Rorer. Thus, when Rorer opposed plaintiffs' zoning application, Kalil "knew he could not afford to vote against Rorer ... without running the risk of offending a strongly wished-for customer." Complaint, ¶ 22. Plaintiffs also allege that Clay Hess' brother is affiliated with the law firm which represented Rorer before the Zoning Board in the WVCH matter. Accordingly, Clay Hess "could not avoid being influenced by his brother's association with the ... law firm." Complaint, ¶ 27. Furthermore, Hess "had (and still has) a continuing interest in the success of Walter Kalil and Kalil Printing consisting of Hess' need to protect his investment in Kalil Printing[2] and to protect his political alliance with Walter Kalil." Complaint,

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(Cont'd)

Additionally, Moffit was allegedly approached by Rorer's counsel and told that he (Moffit) did not have the time or money to oppose Rorer and Sterling. Moffit also alleges that the drug companies and the Township have financially supported CART's (and Tiefenthaler's) opposition. To this end, Moffit was told by an "unknown Catholic priest" that the real reason the drug companies were opposing him was because Rorer is the manufacturer of RU-486, popularly known as the "abortion pill," and they didn't want WVCH nearby, since Moffit's views on abortion are "pro-life." Furthermore, the chairman of the Zoning Board, Clay Hess, allegedly told one of Moffit's assistants that the Zoning Board had "to protect Rorer... Rorer is going to give us a multimillion dollar tax base... we can't give up that tax base just for this little station."

2. According to the Complaint, Hess gave Kalil $35,000 to help start this business. Complaint, ¶ 13.

Appendix C

¶ 26. Finally, plaintiffs allege that the School Board did business with Kalil Printing, and that had something to do with its opposition to WVCH.

This complaint contains four counts: a § 1983 action (Count I) based on violations of the First, Fifth and Fourteenth Amendments, a count for punitive damages (Count II), a state count for civil conspiracy (Count III) and a count for violation of the Pennsylvania Constitution (Count IV).

III. Discussion

A. Standard of Review

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rocks v. Philadelphia*, 868 F. 2d 644 , 645 (3d Cir. 1989) . All well-pleaded factual allegations in the complaint must be taken as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Rocks*, 868 F. 2d at 645. The court must draw all reasonable inferences from the allegations and view them in the light most favorable to the non-moving party. *Rocks*, 868 F.2d at 645.

B. Effect of Motion to Dismiss in Related Case

Several issues raised by defendants in these motions to dismiss are identical to those resolved in the December 23 memorandum granting in part and denying in part defendants' motion to dismiss. Where appropriate, I have adopted by reference those parts of the December 23 memorandum which apply here.

Appendix C

C. Plaintiffs' § 1983 Claim

Plaintiffs have alleged violations of three distinct constitutional rights: substantive due process, the first amendment and unconstitutional taking without just compensation. Each of these will be treated separately.[3]

1. Substantive Due Process

Defendants disagree with the December 23 memorandum insofar as it denied the motion to dismiss with respect to the substantive due process claim. That section of the opinion with which defendants disagree reads as follows:

> Defendants have also argued that the complaint fails to allege the requisite entitlement to state a claim for substantive due process. They state that "plaintiffs did not and cannot allege that the Township's zoning ordinance unequivocally authorized construction of their proposed radio station." This argument ignores the substantive due process jurisprudence from this Circuit. As stated in the main text of this opinion, "the deliberate and arbitrary use of government power violates an individual's right to substantive due process." *Bello v.*

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3. Defendants have moved to dismiss the complaints' allegations of an equal protection violation and a procedural due process violation; however, plaintiffs claim that they did not plead either. I will dismiss the equal protection count and the procedural due process count, if they are present, since plaintiffs have indicated their desire not pursue them. See Plaintiffs' Memorandum of Law in Opposition to the Motion of Defendants Kalil, Hess, and Kalil Printing Seeking Abstention or Dismissal at 3, 7.

> *Walker,* 840 F.2d [1124] at 1129 [3d Cir. 1988]. There is no inquiry as to whether the protected property interest is in the land the plaintiff owns and is seeking to use or in the permit he requires for his intended use. It is true that other courts have made this inquiry. *See, e.g., RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 917-18 (2d Cir.), *cert. denied,* 493 U.S. 893 (1989), cited by defendants; (Test for whether a landowner has a legitimate claim of entitlement is whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.") However, that is not the rule of this Circuit, as *RRI Realty* itself makes clear. *Id.* at 916 (reviewing cases).

Subsequent to the issuance of the December 23 memorandum, the Third Circuit Court of Appeals stated that "to prevail on a *substantive* due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of *a protected property interest.*" *Taylor Invest., Ltd., v. Upper Darby Township,* 983 F.2d 1285, 1290 (3d Cir. 1993) (emphasis added). That decision, together with my re-evaluation of other cases including *Bello,* lead me to conclude that defendants are correct in asserting that plaintiffs must show a protected property interest before being able to state a substantive due process claim. Plaintiffs have made no such showing, and indeed, cannot do so unless and until it is proven that they are entitled to the zoning variance which they sought, an issue currently pending in the state court.[4] Plaintiffs contend that

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4. Plaintiffs allege in the complaint that they have a "1st Amendment liberty interest" in their FCC license to begin construction and commence broadcasting. Complaint. ¶ 70-71.

the unreasonable delay in deciding their application is the basis for their substantive due process violation. While defendants' alleged actions, if proven, would seem to be a clear example of "deliberate and arbitrary abuse of government power," *Bello*, 840 F.2d at 1129, under the law of this circuit it does not state a substantive due process claim unless accompanied by a protected property interest. Therefore, I dismiss plaintiffs' 1983 count insofar as it is based on substantive due process.

2. First Amendment

For the reasons discussed in the December 23 memorandum, plaintiffs' 1983 claim, insofar as it based on first amendment considerations, is dismissed.

3. Taking Without Just Compensation

Defendants argue that plaintiffs have failed to allege any facts which meet the standards for stating a valid takings claims.[5] I agree. Once again, I point out that this lawsuit does not challenge the constitutionality of the zoning ordinance: it is a request for damages for the delay in rendering a decision. Therefore, it is this temporary delay only which can be considered the basis for plaintiff's takings claim.

Viewed this way, plaintiffs do not state a takings claim. There may be, at best, a diminution in value of plaintiffs' property for that part of the delay in deciding the Moffits' application which was unreasonable. First of all, normal delays in obtaining building

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5. The Fifth Amendment, applicable throught the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."

permits, changes in zoning ordinances, etc. are not takings. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389 (1987). More importantly, a taking does not result merely because a plaintiff has been denied the best use or uses of his property; a plaintiff must be deprived of all economically viable uses of the property. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2482, *reh. den.* 483 U.S. 1040 (1987), *citing Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 988 (1962). Plaintiffs do not allege that they have been deprived of all economically viable uses of the property. Accordingly, plaintiffs' 1983 claim, insofar as it is based on a takings claim, is dismissed.

D. Judicial Immunity and Abstention

Defendants Kalil and Hess argue that they are entitled to absolute judicial immunity, and that this court should abstain from the instant action by applying the *Pullman* doctrine. *See Railroad Com. of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643 (1941). Due to the disposition of the case on other grounds, it is unnecessary to decide these aspects of defendants' motions.

E. Counts III and IV

Counts III and IV of plaintiffs' complaint are pendent state claims for civil conspiracy and violation of the Pennsylvania Constitution. Now that the federal counts have been dismissed, plaintiff's basis for federal jurisdiction no longer exists, thereby warranting the dismissal of plaintiff's pendent state claims. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 106 (3d Cir. 1990) (stating that "the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court.")

Appendix C

IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaint is GRANTED.

An order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENHALER,

Defendants.

ORDER

AND NOW, this 15th day of July, 1993 f or the reasons set forth in this court's memorandum and opinion in the related case of *WVCH Communications, Inc., et. al v. Kalil. et. al,* Civil Action No. 93-CV-2225, it is ORDERED THAT the order granting in part and denying in part defendants' motion to dismiss dated December 23, 1992, is VACATED to the extent that it denied defendants' motion to dismiss the substantive due process count, and defendants' motion to dismiss the substantive due process count is GRANTED.

IT IS SO ORDERED.

BY THE COURT:
s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-2225

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

WALTER KALIL, CLAY HESS, INDIVIDUALLY; KALIL PRINTING INC., AND THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL DISTRICT,

Defendants.

ORDER

AND NOW, this 15th day of July, 1993, upon consideration of Defendants' motion to dismiss, it is hereby ORDERED that the motion is GRANTED.

IT IS SO ORDERED.

BY THE COURT:
s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX D — UNITED STATES DISTRICT COURT MEMORANDUM AND ORDER FILED DECEMBER 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP, ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENTHALER,

Defendants.

MEMORANDUM

BUCKWALTER, J. December 23, 1992

I. *Introduction*

Defendants have moved to dismiss this complaint pursuant to Fed. R. Civ. P.12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, the motion is granted in part and denied in part.

II. *Facts*

Plaintiffs Thomas H. and Alice E. Moffit (hereinafter

collectively "Moffit") own WVCH, a for-profit, religion-oriented, AM radio station.[1] WVCH is also a named plaintiff. The Moffits purchased a parcel of land in Upper Providence Township (the "Township") in order to expand and relocate WVCH. This parcel is zoned Residential/Agricultural, and thus Moffit could not put WVCH on that parcel without some change in the zoning. Accordingly, Moffit filed an application with the Upper Providence Township Zoning Hearing Board (the "Zoning Board") challenging the Upper Providence Zoning Ordinance (the "zoning ordinance") on the basis that it unconstitutionally excluded radio broadcast facilities from the Township. Various parties opposed this application, including defendants Rhone-Poulenc Rorer ("Rorer"), Sterling Research Group ("Sterling") and Susan Tiefenthaler, the leader of CART (Citizens Against Radio Towers) and also allegedly a Republican Committeewoman. Rorer and Sterling are both pharmaceutical companies.

In accordance with the application, a formal series of hearings began before the Zoning Board on September 19, 1989. Plaintiffs allege that the Zoning Board never intended to give them a fair hearing, and that the hearings were dragged out merely to harass and discourage them. No decision was handed down until October 2, 1992, the same day plaintiffs filed their complaint.

One of the issues in these hearings was radio frequency interference ("RFI"). Moffit alleges that the Zoning Board knew that consideration of RFI was preempted by federal law. This was a method by which opposition to the application, allegedly with the acquiescence of the Zoning Board, attempted to "extend the hearings and harass plaintiffs into submission."

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1. The factual narrative is taken from the complaint.

Appendix D

Additionally, Moffit was allegedly approached by Rorer's counsel and told that he (Moffit) did not have the time or money to oppose Rorer and Sterling. Moffit also alleges that the drug companies and the Township have financially supported CART's (and Tiefenthaler's) opposition. To this end, Moffit was told by an "unknown Catholic Priest" that the real reason the drug companies were opposing him was because Rorer is the manufacturer of RU-486, popularly known as the "abortion pill," and they didn't want WVCH nearby, since Moffit's views on abortion are "pro-life." Furthermore, the chairman of the Zoning Board, Clay Hess, allegedly told one of Moffit's assistants that the Zoning Board had "to protect Rorer . . . Rorer is going to give us a multimillion dollar tax base . . . we can't give up that tax base just for this little station."

Plaintiffs' complaint consists of four counts. Count I is a request for injunctive and declaratory relief, asking that the court require the Zoning Board to act favorably upon plaintiffs' application, and declare that RFI is a federally preempted matter. Counts II, III and IV are requests for damages resulting from the delay in the proceedings, plus punitive damages and attorneys' fees, pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, and state law civil conspiracy.

It is important to note exactly what the plaintiffs are challenging, and the relief they are requesting. The complaint was filed before the Zoning Board issued a ruling, therefore their decision is not at issue. Plaintiffs' § 1983 claim clearly requests damages resulting from the delay in deciding on Moffit's application. Most importantly, however, Moffit is not challenging the constitutionality of the zoning ordinance itself. Plaintiffs did not provide a copy of the ordinance or the reasons why they believe it is unconstitutional. In plaintiffs' memorandum in support of

their motion for injunctive and declaratory relief, Moffit concedes that he is not challenging state law but is "challenging the actions of public officials with respect to that law." Therefore, the allegations go to the conduct of the Zoning Board only, and the motion to dismiss is analyzed accordingly.

III. *Discussion*

A. *Standard of Review*

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). All well-pleaded factual allegations in the complaint must be taken as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Rocks*, 868 F.2d at 645. The court must draw all reasonable inferences from the allegations and view them in the light most favorable to the non-moving party. *Rocks*, 868 F.2d at 645.

B. *Plaintiffs' § 1983 Claim*

An actionable section 1983 claim must allege facts sufficient to support a determination that "(i) that the conduct complained of has been committed under color of state law, and (ii) that [the alleged] conduct worked a denial of rights secured by the Constitution or laws of the United States." *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir.), *cert. denied*, *In re Abdul-Akbar*, 111 S. Ct. 237 (1990), citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

Plaintiffs have alleged violations of four distinct constitutional rights: procedural due process, substantive due

process, first amendment and equal protection. Each of these will be treated separately.

1. *Procedural Due Process*

In order to state a claim for a violation of procedural due process, plaintiffs must allege that the state has not provided a meaningful post-deprivation remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981);[2] *Hudson v. Palmer*, 468 U.S. 517 (1984) ("[T]he Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently [or intentionally] deprives an individual of property, provided that the state makes available a meaningful post-deprivation remedy.") *See also Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) ("The constitutional violation actionable under § 1983 is not complete when the deprivation occurs: it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.") The Third Circuit has held that Pennsylvania's procedures for challenging zoning ordinances substantially conformed with the due process guidelines enunciated by the Supreme Court. *Rogin v. Bensalem Township*, 616 F.2d 680, 695 (3d Cir. 1980), *cert. denied, Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029 (1981). Indeed, plaintiffs have already appealed to the Montgomery County Court of Common Pleas.

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2. One aspect of the holding of *Parratt v. Taylor* was that a plaintiff could be deprived of due process by a negligent act of an official. In *Daniels v. Williams*, 474 U.S. 327, 328 (1986), the Court overruled this aspect of *Parratt* and held that the Due Process Clause is not implicated by a negligent act of an official causing unintended loss of life, liberty, or property. This aspect of the *Parratt* holding is not relevant to this case, since plaintiffs here have not alleged a negligent act but an intentional one.

Appendix D

Neither can the allegedly unreasonable, intentional delay support a procedural due process claim. *See Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3d Cir.), *reh. en banc den.*, 1991 U.S. App. LEXIS 25, 678 (1991), *cert. denied*, 112 S. Ct. 1668 (1992), citing *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir,), *cert. denied*, 488 U.S. 851, *cert. denied*, 488 U.S. 868 (1988).

Plaintiffs urge this court to follow the example of *C & M Group, Inc. v. New Britain Township*, 1991 U.S. Dist. LEXIS 2239 (E.D. Pa. 1991). In that case Judge Gawthrop distinguished *Parratt v. Taylor* in the zoning context, noting that the *Parratt* Court had held that post-deprivation remedies were adequate to satisfy due process "only when the circumstances surrounding the deprivation require quick action by the state, or when pre-deprivation procedures are impractical . . . Neither exists in the context of zoning review."

Nevertheless, Judge Gawthrop dismissed the procedural due process count, because the plaintiff's complaint that the Zoning Board acted arbitrarily went to substance rather than procedure, and because plaintiff failed to allege "what procedures or procedural mechanisms were in fact required by the Constitution and were in fact denied."

The case at bar does not state a case for procedural due process even under C & M Group, since this case too involves allegations going to substance rather than procedure. Moffit has not alleged that the zoning process itself was constitutionally defective or that necessary procedures were not provided, but only that the actions of defendants violated his rights.

For these reasons, plaintiffs' procedural due process claim must be dismissed.

Appendix D

2. *Substantive Due Process*

Plaintiffs claim that the Zoning Board's delay in making a decison constituted a substantive due process violation. The touchstone of a substantive due process violation is "the deliberate and arbitrary abuse of government power." *Bello v. Walker,* 840 F.2d at 1129. In that case, plaintiffs alleged that municipal officials had violated their right to substantive due process by denying them a building permit. The Court of Appeals reversed the district court's grant of summary judgment to defendants on that count, stating that:

> The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. (Footnote omitted.) These accusations can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Id. at 1129-30.[3]

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3. Defendants have also argued that the complaint fails to allege the requisite entitlement to state a claim for substantive due process. They state that "plaintiffs did not and cannot allege that the Township's zoning ordinance unequivocally authorized construction of their proposed radio station." This argument ignores the

(Cont'd)

Appendix D

Allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of a substantive due process violation. *Midnight Sessions, Ltd.*, 945 F.2d at 667, *citing Bello*, 840 F.2d at 1129. Furthermore, while the state may consider community sentiment in evaluating applications for licenses if community objection is based on "legitimate state interests," a government's determinations predicated on "the public's negative attitudes or biases, unfounded fears or speculation, prejudice, self-interest or ignorance is arbitrary and irrational action." *Id.* at 685.

The case presents allegations similar to *Bello v. Walker*. If the Zoning Board acted (or delayed acting) for political reasons or

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(Cont'd)
substantive due process jurisprudence from this Circuit. As stated in the main text of this opinion "the deliberate and arbitrary use of government power violates an individual's right to substantive due process." *Bello v. Walker*, 840 F.2d at 1129. There is no inquiry as to whether the protected property interest is in the land the plaintiff owns and is seeking to use or in the permit he requires for his intended use. It is true that other courts have made this inquiry. *See, e.g., RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989), cited by defendants; (Test for whether a landowner has a legitimate claim of entitlement is whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.") However, that is not the rule of this Circuit, as *RRI Realty* itself makes clear. *Id.* at 916 (reviewing cases).

Since it has been dismissed on other grounds, it is not necessary to decide whether defendants' arguments regarding plaintiffs' lack of an entitlement would apply in the procedural due process context. However, the court in *Midnight Sessions* describes a property interest as existing when a party satisfies all the *objective* criteria for approval of its plan. *Midnight Sessions*, 945 F.2d at 679.

other impermissible reasons, as enumerated above, then plaintiffs have a valid substantive due process claim. Plaintiffs should be given a chance to prove their allegations. Thus, plaintiffs' substantive due process claim may not be dismissed.

3. *First Amendment*

Plaintiffs claim that there has been an unreasonable restriction placed upon their freedom of speech and their religious freedom. They claim that WVCH "has a right as a matter of religious freedom to reach a new and larger audience if the FCC approves as they have." They also claim that they have "a right to broadcast at the Upper Providence Township location." From these statements, it is apparent that plaintiffs are not seeking redress for past first amendment violations but are seeking relief from enforcement of the zoning ordinance. Their complaint does not reflect that; it challenges the conduct of the Zoning Board. Therefore, plaintiff's first amendment count must be dismissed.

4. *Equal Protection*

Plaintiffs have also alleged a violation of equal protection. However, defendants have not addressed equal protection in their motion to dismiss or accompanying memorandum. Thus, the equal protection count is not dismissed. Defendants may move to dismiss this count in a separate motion, fully briefed, within twenty days of issuance of this opinion.

C. *Injunctive Relief*

Plaintiffs do not meet the requirements for injunctive relief. In order to be entitled to a preliminary injunction, the moving party must show: (1) a reasonable probability of eventual success in the

litigation, and (2) irreparable injury pendente lite if relief is not granted. The court should also take into account, when these are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *In Re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982). Plaintiffs alleged that "[t]he damages and harm plaintiffs are suffering now is continuing and is irreparable since plaintiffs are losing business, suffering an irreplaceable right to communicate their beliefs, and their right to provide access under the 1st Amendment for the communication of their clients' religious beliefs and that these losses cannot be replaced by mere money damages." Complaint, ¶ 88.

Again, since plaintiffs concede that they are not challenging state law, it is unclear what injunctive relief they believe they are entitled to considering the "probability of eventual success." If they wish to avoid application of the zoning law and be permitted to construct their radio station, they should have challenged the zoning ordinance. The only relief plaintiffs may be entitled to based on their complaint is damages resulting from the unreasonable delay. Accordingly, plaintiff's request for injunctive relief is denied.

D. Declaratory Relief

Plaintiffs' claim for declaratory relief must be dismissed because there is no live dispute between the parties on the issue. Plaintiffs contend that defendants dragged out the hearings on its zoning application for three years, largely because of the issue of radio frequency interference, or RFI, despite the fact that it is preempted from local consideration as a matter of federal law. Plaintiffs may raise this as part of its case against defendants for deprivation of due process in unreasonably delaying a decision.

However, since the Zoning Board's decision is not at issue, and since that decision did not mention RFI anyway, the issis not "live" for purposes of making declaratory relief appropriate.

E. *Sterling and Tiefenthaler*

Defendant Sterling has filed a supplemental memorandum in support of defendants' motion to dismiss. Sterling argues that plaintiffs' allegations concerning it, even if true, amount to nothing more than "appropriate participation in the zoning process by a concerned neighbor." Defendant Tiefenthaler has similarly filed a supplemental memorandum. Essentially, the allegations against these defendants are that they entered into an "unlawful agreement" with the Zoning Board to influence the outcome of the proceedings.

A private actor who conspires with a state actor to deprive another of his rights may be found to have acted under color of state law. *See Dennis v. Sparks,* 449 U.S. 24 (1980); *Adickes v.S.H. Kress Co.,* 398 U.S. 144 (1970). Plaintiffs have alleged sufficient evidence of conspiracy with a state actor to survive this motion to dismiss. Tiefenthaler's motion and exhibits are better suited to a motion for summary judgment, since at this time allegations in the complaint are taken as true.

V. *Conclusion*

Plaintiffs may pursue their § 1983 claim, based on an alleged substantive due process and/or equal protection violation, their § 1988 claim, and their civil conspiracy claim against all defendants. Count I, requesting injunctive and declaratory relief is dismissed.

An order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP, ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENTHALER,

Defendants.

ORDER

AND NOW, this 23rd day of December, 1992, upon consideration of defendants' motion to dismiss, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part. Count I, for injunctive and declaratory relief, is DISMISSED. Counts II and III are DISMISSED only to the extend they are based on procedural due process and first amendment considerations.

BY THE COURT
s/ Ronald L. Buckwalter,
RONALD L. BUCKWALTER, J.

ENTERED: 12/23/92
CLERK OF COURT